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2 UNITED STATES DISTRICT COURT
3 DISTRICT OF MASSACHUSETTS

4
5 IN RE: NEW ENGLAND COMPOUNDING) MDL NO. 13-02419-RWZ
6 PHARMACY CASES LITIGATION)
7)
8)

9 BEFORE: THE HONORABLE RYA W. ZOBEL AND
10 THE HONORABLE JENNIFER C. BOAL
11

12 **STATUS CONFERENCE**
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15
16 John Joseph Moakley United States Courthouse
17 Courtroom No. 12
18 One Courthouse Way
19 Boston, MA 02210

20 May 19, 2016
21 2:00 p.m.

22 Catherine A. Handel, RPR-CM, CRR
23 Official Court Reporter
24 John Joseph Moakley United States Courthouse
25 One Courthouse Way, Room 5205
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P R O C E E D I N G S

(The following proceedings were held in open court before the Honorable Rya W. Zobel, United States District Court Judge, and the Honorable Jennifer C. Boal, Magistrate Judge, United States District Court, District of Massachusetts, at the John J. Moakley United States Courthouse, One Courthouse Way, Boston, Massachusetts, on May 19, 2016.)

JUDGE ZOBEL: Good afternoon. Please be seated.

MS. JOHNSON: Good afternoon, your Honor.

COURTROOM DEPUTY CLERK URSO: This is 13-MD-2419, In Re: New England Compounding.

JUDGE ZOBEL: This is my government-issued foot stool (indicating).

All right. Thank you, as always, for your agenda. Now, with respect to Item A-1, do I need to hear argument?

MS. JOHNSON: No, your Honor. Items A-1 and 2 were addressed this morning before Judge Boal in the discovery hearing.

JUDGE BOAL: I would just like to add, at the conclusion of the hearing, plaintiffs' counsel and the Tennessee counsel had offered to discuss a resolution of both the Nashville Healthcare Defendants' motion to strike Dr. Lee and the PSC's motion to strike the supplemental Mixon report. I do encourage the parties to try and work it out.

I will tell you, quite candidly, that coming into the

1 oral argument, I had been inclined to grant both the motions,
2 at least in part. I will, of course, consider the arguments
3 that were made today and review the pleadings based on them,
4 but I thought that might give you a little more encouragement
5 to try and work it out and, certainly, you would have more
6 control over the issues than if I decide the motions.

7 I would say, though, if there are any more
8 depositions that are agreed to, to resolve the issues, that
9 they really should happen in the next two weeks.

10 MS. JOHNSON: Thank you, your Honor.

11 JUDGE ZOBEL: Now, that takes care of (A). (B)
12 counsel want to argue?

13 MS. JOHNSON: Yes, your Honor. Mr. Chalos wishes to
14 address that for the Plaintiffs' Steering Committee.

15 MR. CHALOS: Right, but I'm fine to waive oral
16 argument. This is Saint Thomas' motion. If they want to
17 argue it, then we can argue it, but I don't insist on arguing it.

18 MS. GREER: Your Honor --

19 JUDGE ZOBEL: Does Saint Thomas insist?

20 MS. GREER: Marcy Greer for the Saint Thomas
21 Defendants.

22 We will be very brief, but we would like to address
23 this argument. It's very important because there are three
24 different theories that are asserted against our clients and,
25 as you know, we have three clients who are in this case, and

1 the summary judgment papers will help really reduce the number
2 of claims, we believe, so that we can prepare the jury charge.
3 Both of these motions -- or at least the combined motion is a
4 partial motion for summary judgment. We have separately --

5 JUDGE ZOBEL: These are the agency motions?

6 MS. GREER: The agency and direct liability, correct,
7 your Honor. And, frankly, the agency and direct liability
8 theories are alternatives. They're inconsistent. One is the
9 theory that we were directly liable to the plaintiffs, that we
10 owed duties directly to the Saint -- the STOPNC plaintiffs to
11 manage STOPNC as to their procurement of pharmaceutical
12 devices -- I mean, pharmaceutical products, excuse me, and
13 that that direct duty -- we're trying to figure out where it
14 arises from because there's no case authority. There's no
15 legal duty. There's no factual basis for that duty, and it
16 would really simplify the issues for trial if we didn't have
17 that theory in the mix. It's unsupported, and they had the
18 chance to develop it, and they can't cite a single case that
19 even comes close to the situation we have, where we had no
20 patient/physician relationship --

21 JUDGE ZOBEL: Excuse me for interrupting for a
22 moment.

23 When you're talking about direct liability, who is
24 the defendant that you're now addressing?

25 MS. GREER: The three Saint Thomas Entities, Saint

1 Thomas Network --

2 JUDGE ZOBEL: All three of them?

3 MS. GREER: Yes. It's been asserted against all
4 three.

5 Now, of course, each one is a little bit different.
6 Saint Thomas Network is the only investor in STOPNC. They're
7 50 percent owner. The other two have no investment interest
8 whatsoever and, frankly, that analysis is really more of
9 apparent agency theory, which we are moving for separately on
10 the basis of the individual Bellwether defendants, but
11 apparent agency is plaintiff specific. It's the idea that
12 this plaintiff reasonably relied upon. So, we do not move for
13 that on a global basis.

14 The motion that's before you today is the global
15 motion and it deals only with actual agency, and actual agency
16 means that there was a direct delegation. Apparent agency
17 issues are irrelevant to actual agency.

18 And then the other theory, which is separate and
19 apart from the agency theory, is this direct liability theory
20 that they have attempted to put forth, that we owed a direct
21 duty to these plaintiffs, and there's really no basis for it
22 whatsoever.

23 There's no showing in any of these corporate
24 documents -- and we put forth everything. We put it all on
25 the table in front of the Court. There are operating

1 agreements, services agreement. The operation of STOPNC was
2 delegated by the board of directors to the Howell Allen
3 Clinic. That's in the paperwork. It's a supplement to the
4 operating agreement. And they had the power to do that under
5 the operating agreement, which defines the parties'
6 relationships, and they did.

7 There's no question that Dr. Culclasure and Nurse
8 Schamberg, who are the individual defendants, the ones whose
9 actions are at issue, they were the employees of Howell Allen
10 Clinic. They were not employees of any of the Saint Thomas
11 Entities. There is not a shred of evidence that they were
12 authorized by any of the Saint Thomas Entities, only by
13 STOPNC.

14 And what they're trying to do is kind of morph a
15 single-enterprise theory, which is a veil-piercing theory,
16 which the Court has rejected and already decided on the basis
17 of the pleadings does not fly under Tennessee law, very strict
18 standards, but they're trying to move them all together in one
19 place and say, well, they somehow owed a duty because a
20 pharmacist at Saint Thomas Hospital found out about NECC
21 trying to sell to the hospital and called the Board of
22 Pharmacy, and Mr. Grinder of the pharmacy board said you
23 shouldn't be doing that. And so, he went back to his people
24 in the hospital world and said, maybe we shouldn't be doing
25 this. There's no evidence that he put out policy or anything

1 like that. He just talked to a few people.

2 They're trying to turn that into a duty to reach out
3 to a physician's practice that it is uncontested there was no
4 control over that practice by any of the Saint Thomas
5 Entities, including Mr. Kelvas. It's absolutely clear from
6 the deposition testimony, both sides, that he had no
7 responsibility for STOPNC's pharmaceutical procurement and, in
8 fact, he didn't even know -- excuse me. Let me back up.

9 The STOPNC doctor, Dr. Culclasure, who made the
10 decision to purchase did know even know who Marty Kelvas was.
11 Yet, somehow there is some legal duty arising under Tennessee
12 law to know about these patients and to know that STOPNC was
13 procuring from NECC and raised a question.

14 Now, there is absolutely no evidence that anyone on
15 the Saint Thomas Entities' side of the equation knew anything
16 about procuring from a compounding pharmacy, from NECC, from
17 anywhere. So, there's absolutely no basis for any kind of
18 duty under Tennessee law.

19 They throw out these general negligence duty cases.
20 All of them involve balancing factors and all of them involve
21 some sort of preexisting relationship with the plaintiffs. We
22 don't have that here.

23 Now, some of these people were treated by Saint
24 Thomas after the fact, very different situation, but that
25 doesn't impute a duty before. There's just no way that that

1 can happen.

2 And we've lined out all the cases. We've given you
3 the *Vanderbilt vs. Choate* case, which I think is probably one
4 of the best examples. Vanderbilt actually owned the facility
5 where the clinic was operating, and the Court still found no
6 duty. Here, we didn't even own the medical building that
7 STOPNC was operating in. It's completely separate from the
8 hospital. So, there was no way for these two entities to come
9 together in a direct liability situation. And so, we would
10 ask that the Court find that there's no duty under the direct
11 liability theory, as a matter of law.

12 JUDGE ZOBEL: Thank you.

13 MS. GREER: And then as to the actual agency, we've
14 lined that out in the papers in great detail. I'm happy to
15 address any questions about that.

16 JUDGE ZOBEL: No need. Anything else?

17 MS. GREER: I'll let it rest at that.

18 JUDGE ZOBEL: Mr. Stranch.

19 MR. CHALOS: Mark Chalos, your Honor, for the
20 plaintiffs.

21 JUDGE ZOBEL: Oh, I'm sorry.

22 MR. CHALOS: That's okay. So, I will be brief. I
23 want to address just a couple of issues.

24 This motion is directed toward the actual agency
25 claims and the direct liability claim against the Saint Thomas

1 Entities. The actual agency claim arises from their actual
2 control in practice, irrespective of what their documents say.

3 JUDGE ZOBEL: In control of what?

4 MR. CHALOS: I'm sorry. Over the Saint Thomas
5 Clinic, the Saint Thomas Outpatient Neurosurgical Center and--

6 JUDGE ZOBEL: What's the nature of that control?

7 MR. CHALOS: It was complete control. This is an
8 entity that they joined -- now, they're blaming Howell Allen
9 Clinic, their partner, today. They didn't always do that.
10 They started to do that recently.

11 The clinic is a creation of the Saint Thomas
12 Entities. It is owned by a holding company. The board
13 members of the Saint Thomas Clinic come from the Saint Thomas
14 Hospital. It's either their CEO, their CMO, chief medical
15 officer, their chief financial officer, written into their
16 documents. Their creation documents says Saint Thomas Health
17 Services has a complete veto over anything that happens here.
18 If there's something that's happening here that we don't like
19 because it's inconsistent with our mission, then we can tell
20 you what to do, when to do it. We can shut you down if we
21 need to. It's complete control.

22 The apparent -- I'm sorry. The actual agency claim
23 doesn't require them exercising day-to-day control. It
24 requires them having the right to do it, and they did. And,
25 in fact, they did exercise quite a bit of control, and that's

1 in our papers. We've spilled a lot of ink on this issue. So,
2 I don't want to rehash all of that, but they did have actual
3 control.

4 And the Court need to look no further as to when --
5 after this all came to light, you will see that the CEO of
6 Saint Thomas Hospital -- I'm sorry -- of the corporate parent
7 of Saint Thomas Hospital, Dr. Schatzlein, he stepped in and
8 ran the show at the clinic. He did the PR. He did the crisis
9 management. He oversaw the notifications. He ran the whole
10 operation, and he said right, that was my power to do that.
11 As the CEO of the corporate parent, I can step in whenever I
12 want. So, there's -- in the documents themselves there are
13 plenty of bases for them to assert actual control, and they
14 did at various times over the entities.

15 The direct liability claims -- now, these are
16 different. I don't agree they're inconsistent, but they arise
17 not from their role as board members or roles -- their role as
18 controlling this entity, necessarily.

19 The pharmacy director of Saint Thomas Hospital --
20 remember, this clinic, Saint Thomas Clinic, is located in the
21 Saint Thomas Hospital campus.

22 NECC called on this guy, the director of pharmacy for
23 Saint Thomas Hospital, and said, We want to sell you these
24 drugs in bulk, the way they sold it to the Saint Thomas
25 Clinic. And this guy said, That's illegal. Called the state

1 Board of Pharmacy. They confirmed that it's illegal, and then
2 he put out a notice to the other hospitals, the not-for-profit
3 side of the Saint Thomas Health System and said, Don't buy
4 from compounders. It's illegal. They are joint venturers.
5 They have the right to control the Saint Thomas Clinic, which
6 was a for-profit entity, and somehow or another, they never
7 told them.

8 So, the patient walks into Saint Thomas. They go and
9 make a right, they're not getting compound medication. They
10 make a left and go to the 9th Floor, they might get compounded
11 medication. It turns out, contaminated compound medication.

12 So, the duty there arises not from their paperwork,
13 not from their legal relationships, and the cases they cite
14 deal with creditors, and what have you. It arises from a
15 simple negligence theory, meaning that they owe a duty of care
16 to anybody who is reasonably foreseeably impacted by their
17 conduct.

18 A patient walking into Saint Thomas has the right to
19 expect that they will be treated as any other patient at Saint
20 Thomas, and they've admitted that.

21 JUDGE ZOBEL: Does the duty of care arise from the
22 fact that they acted with respect to nonprofit parts of it,
23 but not to the profit piece of it?

24 MR. CHALOS: Well, I think that's their part of the
25 breach of their duty. I think their duty arises from the fact

1 that they put their name -- and I think this overlaps with the
2 apparent agency claim. They put their name on the door. They
3 sell it to the community as the Saint Thomas Entity. When a
4 patient walks into that entity, they expect that they're going
5 to get treated as any other patient at Saint Thomas and --

6 JUDGE ZOBEL: But that's an issue of apparent agency,
7 isn't it?

8 MR. CHALOS: It is. It is.

9 JUDGE ZOBEL: It's not actual agency.

10 MR. CHALOS: Well, that may or may not be actual
11 agency, but what it is those -- it is foreseeable, and we're
12 switching to the negligence sort of analysis, which is who
13 does an actor owe a duty to, and it's anybody foreseeably
14 impacted.

15 JUDGE ZOBEL: It arises out of the actor's conduct,
16 not necessarily out of the relationship -- the legal
17 relationship of the actor and the subsidiary.

18 MR. CHALOS: Right.

19 JUDGE ZOBEL: And here, we're getting it all muddled
20 up now.

21 MR. CHALOS: Well, I agree with your first point,
22 your Honor, and it may be muddy, and that's actually part of
23 the issue, which is it is muddy. The relationships between
24 these entities are muddy.

25 JUDGE ZOBEL: Well, I'm not sure whether that's the

1 case, but certainly at the moment I'm -- I feel muddy -- the
2 issue is muddy because you're talking both about particular
3 conduct --

4 MR. CHALOS: Right.

5 JUDGE ZOBEL: -- of the purchasing person, and then
6 you're also talking about a relationship based on things other
7 than conduct, just by virtue of who they are vis-à-vis each
8 other.

9 MR. CHALOS: Right. Right. And I think -- right, I
10 agree with your Honor. There's certainly overlap, I think,
11 between the legal theories. The apparent agency --

12 JUDGE ZOBEL: But which one are you relying on now?
13 I mean, I understood you to rely on the fact that the
14 purchasing person told the for-profit -- the non-profits not
15 to use the compounding product, but failed to do so for the
16 for-profit piece.

17 MR. CHALOS: Right. Yes, your Honor. That is a
18 very --

19 JUDGE ZOBEL: Therefore?

20 MR. CHALOS: I'm sorry?

21 JUDGE ZOBEL: Therefore?

22 MR. CHALOS: Therefore, they had breached their
23 obligations to the patients of the entire health system. They
24 fulfilled them, perhaps, with respect to some patients.
25 Meaning, the not-for-profit side patients, but with respect to

1 the for-profit side patients, they were never told -- their
2 purchasing people were never told, don't buy from compounders.
3 We know -- it's not just in the abstract. They were reacting
4 to an NECC salesperson walking into the Saint Thomas campus
5 selling compounded medication, and that's exactly what
6 happened in the Saint Thomas Clinic as well. One side, you
7 know, a couple of hundred yards away says this is illegal,
8 nobody do it, and then, you know, on the 9th Floor they said,
9 let's do it. We're going to make some money -- or save some
10 money by doing it. The person who knew, the director of
11 pharmacy, had an obligation by virtue of his knowledge and the
12 foreseeability that people are walking into that campus
13 expecting to be treated by Saint Thomas, expecting a certain
14 level of safety and a certain standard of care that would be
15 applied to them.

16 JUDGE ZOBEL: Okay. Thank you. Anything else, Ms.
17 Greer?

18 MS. GREER: Yes, your Honor, just very briefly.

19 JUDGE ZOBEL: When you say, "very briefly," what do
20 you mean?

21 MS. GREER: I think I've been pretty brief. I
22 usually get twenty minutes in oral judgment.

23 JUDGE ZOBEL: Do you?

24 MS. GREER: At the Court of Appeals.

25 JUDGE ZOBEL: But we're not at the Court of Appeals.

1 MS. GREER: Going to this point about total control,
2 this is a joint venture agreement. Saint Thomas Network owned
3 50 percent and Howell Allen owned the other 50 percent. They
4 had the right each to appoint two board members.

5 The complete control, the veto provision that he's
6 talking about is Section 6.10. It's called, "Member
7 approval," and without either party's written consent, you
8 can't do things that fundamentally affect the organization,
9 like amend the agreement, basically dissolve the agreement,
10 merge the company, sell or otherwise transfer all or
11 substantially all of the assets. These are standard
12 provisions in any -- just about every operating agreement I've
13 ever seen. This has nothing to do with whether or not the
14 Saint Thomas Network, who had the right to appoint two board
15 members, was controlling pharmaceutical policy. This point
16 about the profit and nonprofit, I think that divides the
17 lines.

18 The point was that Marty Kelvas had authority and
19 responsibility for the hospital side of the practices. He is
20 a hospital pharmacist, and what -- his conversation with the
21 board -- with the pharmacy board was in the context of
22 providing hospital care.

23 Hospitals have their own in-house compounding
24 abilities, and they have very different rules from a
25 physician's practice. Hospitals do not tell physicians how to

1 practice medicine or the other way around. In fact, Tennessee
2 has a corporate practice of medicine prohibition that we've
3 raised in the context of actual agency, not apparent agency,
4 different issue, but in the context of actual agency, and we
5 cited to you the *Thomas* case where they said, "Hospitals in
6 Tennessee are legally precluded from controlling the means and
7 methods by which physicians render medical care and treatment
8 to the hospital patients," citing this provision in the
9 Tennessee code that we have cited.

10 So, we cannot be liable for anything that Dr.
11 Culclasure did in any way, shape or form under an actual
12 agency theory. It's just not possible.

13 The suggestion that people turn right or left and go
14 one place or the other, I mean, all that goes back to the
15 apparent agency and expectations and foreseeability. The
16 Court is exactly right. They're different issues, but there's
17 nothing in this record that shows that the Saint Thomas
18 Entities actually -- exercised actual control.

19 I do want to say one point about Dr. Schatzlein's
20 comments and his activities. That was after a meningitis
21 outbreak of critical proportions that this Court is well
22 familiar with. The Saint Thomas Entities came and rendered
23 aid because STOPNC did not have the public relations, the
24 patient relations capabilities to deal with this and they
25 called for help, and Saint Thomas was happy to provide it. In

1 fact, Dr. Schatzlein was very clear in the next sentence after
2 the one that they quote, he said, "Remember, now, this is
3 after all the harm had been done and what we're doing now is,
4 again, all hands on deck to try and help these patients."
5 That was what it was about. That was not showing that there
6 was an exercise of control beforehand or that a duty was owed
7 beforehand. None of that was in play and, as a matter of law,
8 those claims should be dismissed on summary judgment.

9 JUDGE ZOBEL: Thank you. I will take the papers on
10 that motion.

11 Now, we go to status of bankruptcy. Ms. Johnson --
12 or no. Who will take care of this?

13 MS. JOHNSON: Ms. Wintle will address that today,
14 your Honor.

15 MS. WINTLE: Good afternoon, your Honor. Keri
16 Wintle --

17 JUDGE ZOBEL: Please remain seated because we need to
18 use the microphones for the people who are listening from
19 afar.

20 MS. WINTLE: Understood. I apologize.

21 JUDGE ZOBEL: You can pull it over to you. Thank
22 you. Can you tell me your name again, please.

23 MS. WINTLE: Keri Wintle.

24 JUDGE ZOBEL: Wintle?

25 MS. WINTLE: Wintle.

1 JUDGE ZOBEL: Thank you.

2 MS. WINTLE: Appearing for the post confirmation
3 officer, Paul Moore.

4 Since the last status conference in April, there's
5 not a whole lot to report out of the bankruptcy court. There
6 have been a few motions that have been filed by claimants
7 seeking either to have their late claims deemed timely or to
8 file late claims.

9 Based on the circumstances of those motions, the post
10 confirmation officer has given his assent to the relief
11 requested thereunder.

12 The post confirmation officer continues to work with
13 the Insiders to facilitate the payment of their tax refunds to
14 the bankruptcy estate in accordance with their settlement
15 agreements entered into.

16 The 2014 refunds have been received and currently the
17 2015 refunds are being processed, and at this point that is
18 all I have to provide to the Court with respect to the status
19 of the bankruptcy court.

20 JUDGE ZOBEL: What is the status of -- maybe it isn't
21 your brief, but what is the status of the distribution of the
22 settlement, the tort trust?

23 MS. WINTLE: Sorry.

24 MR. ELLIS: Your Honor, this is Rick Ellis.

25 So, we have been negotiating with Medicare for

1 months. We anticipate in the next week to know whether we're
2 going to have a deal with Medicare or not, but in either
3 event, we think that the first payment should be able to go
4 out probably by the beginning of July. We've got about 1200
5 payments ready to go. They're running them through the
6 Medicare rolls now. So, at least some payment should be able
7 to go, whether we've reached an agreement or not.

8 JUDGE ZOBEL: Are these payments partial payments --
9 understood to be partial payments due to any claimants?

10 MR. ELLIS: Yes, these are initial payments. There
11 will be a final payment down the road.

12 JUDGE ZOBEL: So, everybody will get paid twice?

13 MR. ELLIS: That is what is -- yes, that's correct.

14 JUDGE ZOBEL: Thank you.

15 MR. ELLIS: You're welcome.

16 JUDGE ZOBEL: Ms. Johnson.

17 MS. JOHNSON: We will -- just to follow up on that,
18 your Honor, we will advise the Court when payments are going
19 out, and we will keep the Court apprised at the status
20 conferences going forward as to how that practice is
21 unfolding.

22 JUDGE ZOBEL: Thank you. The insurance declaratory
23 actions.

24 MS. JOHNSON: Mr. Gastel will address that, your
25 Honor.

1 MR. GASTEL: As has been the last several months,
2 there's no update there, your Honor. It continues to sit on
3 the judge's desk down in Tennessee.

4 MS. JOHNSON: Brings us to No. 6, the status of
5 discovery. The Emory and Vanderbilt motions to quash were
6 addressed this morning. So, I don't think they need to
7 address those here.

8 That brings us, then, to the Court rulings update.
9 There is an amended scheduling order addressing the Tennessee
10 cases, and I believe Mr. Gastel wanted to address that as well.

11 MR. GASTEL: This actually really dovetails with 8-A
12 and 8-C, your Honor. I believe in that order you had asked
13 the parties to meet and confer on a proposed schedule for the
14 remaining Bellwether cases. The parties, I believe, are
15 prepared to offer October 11th and November 7th as the dates
16 for the next two Bellwether trials.

17 JUDGE ZOBEL: I'm sorry. Give me those dates.

18 MR. GASTEL: October 11th and November 7th. If you
19 recall, your Honor, you set the first Bellwether trial for
20 August 22nd.

21 JUDGE ZOBEL: Right, I remember that one.

22 MS. GREER: And, your Honor, on behalf of the Saint
23 Thomas Entities, we are agreeing to trial schedules based on
24 our objections that are pending in the omnibus motion about
25 venue and jurisdiction.

1 JUDGE ZOBEL: Okay. And each of these is likely to
2 take, I think you said, six to eight days to try or eight to
3 ten days? I can't remember.

4 MR. GASTEL: Your Honor, I think that we're still
5 trying to decide about how long the trials will take.
6 Obviously, that will be dependent upon some pending rulings of
7 the Court. Mr. Chalos can probably speak more directly to how
8 long he thinks at least the first trial will take.

9 MR. CHALOS: Well, I can speak to the plaintiffs'
10 case. I think we could do our case in probably four to five
11 days. We have a motion, your Honor, on the issue of whether
12 the various regulatory agencies and what they did or what they
13 didn't do would be part of the proof in the case. They're not
14 parties and they will not --

15 JUDGE ZOBEL: Not part of what we're coming to.
16 There are some motions and motions for leave to file summary
17 judgment motions that deal with that.

18 MR. CHALOS: Right. And so, that ruling will, in
19 part, dictate on how long our proof will be.

20 JUDGE ZOBEL: Okay.

21 MS. JOHNSON: I think we can then jump to the B-iv,
22 your Honor, which is just to acknowledge that the Court has
23 also issued an order setting discovery deadlines in the
24 Premier and Box Hill cases. I don't think there's anything
25 further to address there, unless defense counsel feels

1 otherwise.

2 MR. WOLK: Nothing.

3 MS. JOHNSON: I think that brings us, then, to No. 7.
4 No. 7 is actually marked up as a notice of a letter, but since
5 we've issued that letter and notice, Plaintiffs' Steering
6 Committee filed earlier today a status report that gave an
7 overview of the remaining cases against clinic defendants in
8 the MDL.

9 We observe that the cases against the Tennessee
10 clinics, Box Hill and Premier, were ongoing and being actively
11 litigated according to schedules, and the Court had asked us,
12 I think at the last status conference, what the PSC's view of
13 what should be done with the remaining cases.

14 So, since the last status conference, we've gone back
15 to update our census of cases, and we've realized a couple of
16 things. First and foremost, a number of the cases that had
17 been listed on the PSC's census had, in fact, been dismissed
18 or, in a few instances, even though a dismissal had not been
19 filed, plaintiffs' counsel believed that they had functionally
20 been resolved and, therefore, dismissed. So, there's a little
21 bit of cleanup where I expect some plaintiffs' counsel to file
22 a couple of stipulations within the next week or so just to
23 clarify on those cases.

24 We also -- if you turn to Page 2 of --

25 JUDGE ZOBEL: I'm sorry. These are not PSC

1 dismissals. They're dismissals by the original counsel in the
2 original jurisdictions?

3 MS. JOHNSON: That's correct, your Honor.

4 JUDGE ZOBEL: And will they let you know when they do
5 that?

6 MS. JOHNSON: Well, they do and they don't. They try
7 very hard, but, as you know, it's large number of cases and
8 sometimes I think things, unfortunately, slip through the
9 cracks.

10 One of the things that PSC did this time around to
11 try and make sure that wasn't happening, was we actually
12 updated our census and then personally called each plaintiff's
13 attorney in the cases to advise the plaintiff's attorney that
14 the PSC's position was that it was probably appropriate for
15 these cases to be remanded, given the small number of cases on
16 file in the MDL, and that from the PSC's perspective, we
17 didn't see a lot of efficiencies to be gained. There were no
18 logical groupings of cases, for example, from the PSC's
19 perspective, but we made clear to each plaintiff's counsel
20 that we wanted to hear their views and understand what their
21 is preferences were. So, the --

22 JUDGE ZOBEL: These are the cases that have gone
23 away, they're finished?

24 MS. JOHNSON: No, your Honor. I'm now speaking of
25 the existing cases against clinics other than --

1 JUDGE ZOBEL: Okay. Let me go back for a moment to
2 those that have been done. Are you making any progress -- I
3 notice Ms. Gioia is here and she's been working, I think, with
4 you on dealing with the cases that are finished. Are we
5 making any progress in that regard?

6 MS. JOHNSON: Yes, your Honor. I think we're making
7 tremendous progress.

8 JUDGE ZOBEL: And you will include in that the cases
9 that are settling as we go along that you learn about sort of
10 by the way?

11 MS. JOHNSON: Yes. We will work with Ms. Gioia to
12 inform her about those cases and to ensure that the dockets
13 are, again, correctly reflecting dismissal.

14 JUDGE ZOBEL: Thank you.

15 MS. JOHNSON: So, speaking of the existing cases.
16 So, the cases against pain clinics other than the Tennessee
17 defendants, Box Hill and Premier. If you turn to the status
18 report -- I can actually hand up copies, your Honor.

19 JUDGE ZOBEL: I don't have it.

20 MR. KIRBY: Do you have extra copies?

21 (Attorney Johnson hands document to the Court.)

22 (Discussion off the record.)

23 MS. JOHNSON: So, if you turn to Page 2, your Honor,
24 that chart is an effort to summarize the cases against
25 clinics, the remaining clinics in the MDL, and I'll make just

1 a couple of quick observations about that.

2 The total number of cases, now that we've done this
3 and realized there have been some dismissals, has dropped to
4 27. The two largest clinics are APAC and Cincinnati Pain
5 Management, which each have four cases against them. The
6 large number of cases on this list have only a single case
7 against them. As a result of those --

8 JUDGE ZOBEL: How are we going to deal with all of
9 those?

10 MS. JOHNSON: Excuse me?

11 JUDGE ZOBEL: How are we going to deal with those?

12 MS. JOHNSON: Well, I have an excellent suggestion,
13 your Honor.

14 So, if you turn to Page 5, this is then our chart
15 that reflects our -- the PSC's conversations with individual
16 plaintiff's counsel in those actions. The majority of
17 plaintiff's counsel, so speaking to individual attorneys,
18 indicated that they did not object to their case being either
19 remanded or transferred back to the district from which it
20 came. Some attorneys, in speaking with them, indicated that
21 their cases were dismissed. So, we moved those to the
22 appropriate bucket. And some attorneys indicated that they
23 wanted a bit more time to decide what their view was as to
24 whether the case should continue in the MDL through discovery
25 and have a schedule set or whether the case should be

1 appropriately remanded or transferred back to state court.

2 JUDGE ZOBEL: Is the multi-district piece of it done
3 as to those cases? Has discovery been completed?

4 MS. JOHNSON: No, they have not been, your Honor.
5 The PSC -- well, let me observe -- yes and no. I hate to give
6 that answer to a judge, but yes and no.

7 The discovery of the primary defendants here, meaning
8 the New England Compounding Company, the national defendants,
9 all of those defendants that were defendants in all of the
10 cases across the MDL, that is done and has been done for some
11 time. Those materials are all available in a repository that
12 all plaintiffs' counsel have access to. If plaintiffs'
13 counsel would like access and does not have it, they are free
14 to contact me and we can make sure that they get that access,
15 but those materials --

16 JUDGE ZOBEL: So, specific discovery, that's not
17 done?

18 MS. JOHNSON: So, the notion -- the MDL has proceeded
19 with common discovery in many cases. The notion here from the
20 PSC's view is that there's not much, if any, common discovery
21 to be done in these remaining clinic cases, and that's because
22 there's simply too few cases. At most, we have four civil
23 actions pending against a single defendant. So, in the PSC's
24 view, that's probably not an efficient use of the MDL's
25 resources. That's the kind of thing that could be done back

1 in the home court appropriately.

2 Now, again, I'm glad to express the PSC's view and we
3 have thought about it. We've talked to everyone. I would not
4 want to give individual plaintiff's counsel -- I'm sorry. I
5 would not want to deprive individual plaintiff's counsel of
6 their opportunity to comment and weigh in on this.

7 So, the PSC's proposal -- and it's only that -- will
8 be that the Court issue an order to show cause as to why cases
9 on this list should not be remanded or transferred back, and
10 then give plaintiffs' attorneys two weeks, maybe three weeks
11 to respond to that in order to have this matter teed up for
12 the next status conference.

13 If that's something that the Court would consider,
14 the PSC would be happy to draft a proposed order that would
15 spell out a process by which that could be done.

16 JUDGE ZOBEL: A number of these people indicate no
17 objection to remand and some of them are still thinking about
18 it. Would it make sense to -- well, maybe if we order --
19 issue the show cause now would allow them to have a decision
20 by the next time around, that's probably a good thing, isn't it?

21 MS. JOHNSON: I think that's right, your Honor.

22 Our suggestion would be that if the Court issued an
23 order to show cause that asked plaintiffs' counsel who
24 objected to remand or being transferred back to their original
25 federal court district, that responses be due by June 16th.

1 That would be a week before the next status conference, such
2 that if there were any issues that arose or if the Court
3 wanted to address or speak with those individual plaintiffs'
4 attorneys, that could be done at the next status conference.

5 JUDGE ZOBEL: And I assume there are some who may
6 have difficulty getting hold of their clients or, for whatever
7 reason, can't make a decision by then, they can let you know
8 that.

9 MS. JOHNSON: Yes, your Honor.

10 MS. DOUGHERTY: Your Honor, if I may. Kim Dougherty,
11 not in the Plaintiffs' Steering Committee role, but as counsel
12 of record for about a third of these cases, 10 of the 27 --

13 JUDGE ZOBEL: Excuse me. Why don't you sit down and
14 pull the microphone toward you.

15 MS. DOUGHERTY: It won't reach. Perhaps I could
16 switch seats. This one is not working.

17 (Discussion off the record.)

18 MS. DOUGHERTY: Now it's working. Magic touch.

19 Your Honor, Kim Dougherty, counsel of record for
20 about 10 of the 27 cases that are on file.

21 We are the ones who are listed as conferring. We've
22 been meeting with and discussing with defense counsel who
23 actually represents the majority of the cases that are here as
24 well, Tony Abeln -- he represents BKC, CPN and APAC -- on
25 whether or not it does make sense to continue to move forward

1 with discovery here as opposed to remanding the case, given
2 the efficiencies that could result from your Honor's knowledge
3 of this case and all of the discovery that's already been done
4 here and could be available to both plaintiffs and the
5 defendants.

6 So, we are -- I just want the Court to know that at
7 least a third of these cases we are still considering a
8 discovery schedule and not remand, and if we have the
9 opportunity, we'll provide the Court whatever the consensus
10 that we reach with defense counsel is. I would presume we
11 could do that by the next conference.

12 JUDGE ZOBEL: But you don't object to an order to
13 show cause that would give you the option of objecting?

14 MS. DOUGHERTY: Not at all. I just didn't want the
15 Court to be under the understanding that this -- that
16 everybody was agreeing to remand because, in fact, in a third
17 of the cases we're considering discovery here.

18 JUDGE ZOBEL: Okay.

19 MS. DOUGHERTY: Thank you.

20 JUDGE ZOBEL: Did you want to add something?

21 MR. WEIGAND: Your Honor, Tory Weigand. I represent
22 the majority on the defense side.

23 I don't have a lot to add to that, but I heard Ms.
24 Dougherty's comments and I just wanted to say a few words.
25 So, again, Tory Weigand. I represent APAC, the same cases as

1 Ms. Dougherty on defense side.

2 We had some initial discussions, but I can tell,
3 plainly, it will be our position that these cases should be
4 remanded back to their original jurisdictions.

5 JUDGE ZOBEL: The question is when, should it be now
6 or after some additional discovery?

7 MR. WEIGAND: Well, that issue deserves a little more
8 attention and discussion with Ms. Dougherty, whether there's
9 anything else to be done, which is a fair statement. I think
10 most things are sufficiently done now, that those cases can be
11 remanded and that would be the most efficient thing. The
12 MDL's course has run for purposes of serving these cases. So,
13 I think it's the right move to do at this time. So, that's my
14 two cents.

15 JUDGE ZOBEL: Okay.

16 MR. KIRBY: Your Honor, Greg Kirby. I just wanted to
17 let you know -- Greg Kirby on behalf of the Box Hill
18 defendants.

19 I'm just seeing this now for the first time. I think
20 it was filed during discovery hearing before and I was in
21 court for that. So, I'm not 100 percent sure exactly what it
22 says. It's my understanding that it says something to the
23 effect of any defendant that has four cases or less -- you
24 have a mandatory cutoff below five -- gets remanded back and
25 then it's more efficient to do that, and I'm not sure the best

1 way to respond. Like I said, I haven't read through it, but,
2 you know, Box Hill has eight cases in the MDL here.

3 JUDGE ZOBEL: Do you want to go back or do you want
4 to stay here?

5 MR. KIRBY: I want to go back. We have 26 or so,
6 around that number, plus or minus, in state court in Maryland.
7 They're all, except for I think one, you know, the fear cases,
8 the so-called fear cases. So, I'm not quite sure, you know,
9 why it's -- I'm not taking a position on whether the others
10 should go back or not. I'm just saying that if it's more
11 efficient for a defendant with four cases to get sent back to
12 various federal or state courts throughout the country, I'm
13 not sure why it doesn't make sense to send Box Hill defendants
14 back, when we only have eight cases. We have three more cases
15 than the mandatory cutoff. So, I just wanted to throw that
16 out there.

17 JUDGE ZOBEL: Okay. Anything else, Ms. Johnson, on
18 this issue?

19 MS. JOHNSON: Nothing on this issue.

20 JUDGE ZOBEL: Oh, I'm sorry. Another comment.

21 MR. GIDEON: Judge Zobel, C.J. Gideon.

22 There is a third --

23 JUDGE ZOBEL: Whom do you represent?

24 MR. GIDEON: I represent Saint Thomas Outpatient
25 Neurosurgery Center, Howell Allen, and Dr. Culclasure and

1 Debbie Schamberg.

2 JUDGE ZOBEL: You're not in this particular -- you're
3 not about to be sent for lack of numbers?

4 MS. JOHNSON: He sort of might be, your Honor, and
5 I'm --

6 MR. GIDEON: I did not want to sit quietly because
7 there's been a general reference to the Tennessee defendants.
8 There is another entity I represent and it's PCA Pain Care
9 Center and a Dr. Jones...

10 (Discussion off the record.)

11 MR. GIDEON: Well, Dr. Jones. There are three cases
12 total involving Dr. Jones, two under the Seiber name, two
13 different docket numbers, and one under the Daugherty name.
14 And, Ms. Johnson, there was an email to you about this
15 earlier, but this would constitute three cases. Two of those
16 cases are filed by Ms. Daugherty, and one of them filed by
17 Brian Chadwick Rickman, who we've heard nothing from at any
18 time since the case was filed.

19 On behalf of Dr. Jones, we think those three should
20 be returned to Tennessee. I understand the Seiber or *Seiber*
21 case is -- has an impending dismissal. Is that not correct?

22 MS. DOUGHERTY: That's correct. The Seiber case is
23 subject to a dismissal.

24 MR. GIDEON: Okay. We just don't know anything about
25 the Daugherty case, Docket No. 1-14-CV-10430. That should be

1 sent back to Tennessee.

2 JUDGE ZOBEL: Well, let me suggest that any cases
3 that are not on this most recent status report that Ms.
4 Johnson just filed today should let Ms. Johnson know that they
5 wish to be included on this list and why, and then she will
6 make a judgment. If you don't like her judgment, then you can
7 bring it to Court at the next meeting. If she agrees that you
8 should participate in this objecting or not to remand, then,
9 you know, we'll do it and we'll deal with it, but I think it
10 should go through the PSC in order -- because she knows more
11 about the individual cases than I do, and ever will know, but
12 I think if we include in your proposal that anybody who is not
13 on the list who thinks they should be on the list, let you
14 know, maybe by the beginning of next week. Then we can
15 proceed from that, and that includes anybody on the telephone
16 who is not here in the courtroom who fits that category.

17 MS. JOHNSON: And I should say, your Honor, PCA Pain
18 Care was unintentionally omitted from this list. They do
19 belong on this list. So, there's no substantive disagreement
20 there.

21 JUDGE ZOBEL: Okay. Thank you.

22 MR. GIDEON: You also asked are there any other cases
23 that have not been dismissed yet. There is one where there is
24 a stipulation of dismissal signed by all the attorneys, Tyree
25 case, and no order has been entered.

1 JUDGE ZOBEL: Well, let Ms. Johnson know about that
2 one as well. What we're trying to do, in addition to all the
3 other things, is to make a clean docket. So that the cases
4 that are gone are reflected as gone, and we've had trouble
5 doing that, for a whole host of reasons, not the least of
6 which is the way we keep the docket here -- two dockets. That
7 is, two sets of dockets. Okay.

8 MS. JOHNSON: I think that brings us to No. 8, your
9 Honor. We've addressed 8-A, the update on Bellwether trial
10 cases already. So, I think we can turn to 8-B, and I know Mr.
11 Gastel wanted to address that, unless the defendants wish to
12 say something first.

13 JUDGE ZOBEL: Who is doing this? You are?

14 MR. GASTEL: Your Honor, this motion, I believe, was
15 filed last Friday. Your Honor had previously considered --
16 well, the defendants had previously filed a motion for
17 dismissal for failure to comply with the Healthcare Liability
18 Act at the outset of this litigation. That docket number was
19 770.

20 Your Honor back in August of 2014 issued Order No.
21 1360, kicking those issues down to what I believe you styled
22 as the case-specific phase of this case, and this motion that
23 was just recently filed, Docket No. 2874, raises many of the
24 issues that were sort of punted by this Court in 1360.

25 So, we're just looking for a little guidance as to

1 whether or not you believe that we should be dealing with
2 individual dismissals of cases for reported failures to comply
3 with the Healthcare Liability Act now or at some point in the
4 future.

5 The PSC's position is that to the extent that these
6 cases do not touch upon cases that are in the Bellwether pool,
7 that these really are not ripe for decision at this time, and
8 if you could provide some guidance on that or if you want some
9 briefing on that, it would be helpful whether or not we should
10 be subsequently responding to those motions at this phase of
11 this litigation.

12 MR. GIDEON: We respectfully disagree with that, your
13 Honor.

14 JUDGE ZOBEL: I'm sorry?

15 MR. GIDEON: We respectfully disagree with the
16 position Mr. Gastel took, and I would like to be heard on
17 that, too.

18 Your October 29, 2014 order addressed the fact that
19 we had raised the failure of the plaintiffs to comply with
20 Section 121 and 122 of the Healthcare Liability Act, and that
21 order specifically says that those will be addressed later.

22 Now, we have completed -- all but completed common
23 discovery and we have now addressed those. Section 121 is
24 simple. You have to provide 60 days written notice before you
25 file suit and you have to provide certain things in the

1 notice. Section 122 is equally simple. You have to file a
2 certificate of good faith with the original complaint.

3 So, when you look at the motions, I think you will be
4 pleased. They are succinct and to the point. Here's the list
5 of cases that did not comply with Section 121. Here's the
6 list of those that did not comply with one or both.

7 JUDGE ZOBEL: You're talking about this motion,
8 Docket No. 2874?

9 MR. GIDEON: Yes, your Honor, I am.

10 JUDGE ZOBEL: Okay.

11 MR. GIDEON: So, it's a relatively simple matter.
12 There was nothing in your August 29, 2014 memorandum opinion
13 that in any way said we will limit these particular grounds
14 for dismissal to the Bellwether cases I later select, which
15 you hadn't selected at the time.

16 JUDGE ZOBEL: Let me have a look at it, and I will
17 deal with it. I'm not exactly sure all you're talking about
18 because I haven't looked at this before we got here.

19 MR. GIDEON: All right.

20 JUDGE ZOBEL: So, I will do that and one way or the
21 other, I will decide whether it is case specific and it should
22 stay or whether it's not case specific and it should,
23 therefore, be decided and whether it has any impact on the
24 Bellwether or not.

25 MR. GIDEON: All right. Thank you.

1 MR. GASTEL: And, your Honor, sort of dovetailing
2 with that, our response to that motion is technically due a
3 week from Friday. To the extent that you want to look at this
4 issue, obviously, that's fine, but could we get some relief
5 from that deadline until you tell the parties how you want to
6 handle the substantive response to that motion?

7 JUDGE ZOBEL: So, why don't I decide how to deal with
8 it and then give you time to file a response if I decide to
9 deal with it, and if I don't decide to deal with it, I guess
10 you don't need to file a response.

11 MR. GASTEL: That's perfect, your Honor. Thank you.

12 JUDGE ZOBEL: Okay. Ms. Greer.

13 MS. GREER: Your Honor, briefly. We filed a similar
14 motion yesterday. It's Docket No. 2879. So, I think all of
15 them should be considered together.

16 MR. GASTEL: The PSC would not object to that, your
17 Honor.

18 JUDGE ZOBEL: No objection?

19 MR. GASTEL: That's correct, your Honor.

20 JUDGE ZOBEL: Okay.

21 MS. JOHNSON: I think that brings us to No. 9, the
22 report from the pro se liaison.

23 MS. MARTIN: Very quick update, your Honor.

24 As I discussed last time, the bankruptcy court
25 allowed some late-filed claims. We helped about three pro se

1 claimants who wanted our help with getting those filed and
2 those were due by May 13th and they were all in prior to that,
3 and we've had a couple of calls from people regarding their
4 letters from the bankruptcy claims administrator, and we
5 helped them out.

6 JUDGE ZOBEL: Are people still waking up to the fact
7 that they may have claims for which they need to give some
8 kind of notice?

9 MS. MARTIN: No, your Honor, other than those nine
10 pro se's that we dealt with with Judge Neiman and then who had
11 either late-filed claims that were allowed or who had not
12 filed for claims. Other than those, there have not been
13 people that are really coming out of the woodwork unaware.

14 MR. ELLIS: This is Rick Ellis.

15 There's actually three claims -- there's actually
16 three late claims for compensation that have been filed that I
17 believe have been denied and may be appealed to Judge Neiman.

18 MS. MARTIN: They have not come to me yet, but if
19 they do, I will help them.

20 JUDGE ZOBEL: Thank you.

21 MR. GASTEL: Your Honor, I'm sorry, could we back up
22 to one other issue, I think, that's sort of under 8-A or 8-C
23 regarding the current Bellwether trial schedule?

24 I think the parties have agreed -- and the defendants
25 can correct me if I'm wrong. The parties have agreed that the

1 fact discovery cutoff for both fact and expert discovery in
2 the first four Bellwether cases is set for June 10th, 2016.

3 JUDGE ZOBEL: That's for you.

4 JUDGE BOAL: I thought I issued an order on April
5 25th saying May 6th.

6 MR. GASTEL: There were a handful of issues that sort
7 of remained outstanding, particularly with subpoenas to third
8 parties, and the parties have agreed to sort of wrap all of
9 that up by June 10th.

10 JUDGE ZOBEL: Well, she's got to agree, too.

11 MR. GASTEL: And I guess to the extent that the Court
12 needs to agree, we would -- I think the parties would jointly
13 move to move that deadline to June 10th.

14 JUDGE ZOBEL: She'll think about it.

15 JUDGE BOAL: Right. I mean, these are orders.
16 They're not advisory guidelines, and it's not up to the
17 parties to decide unilaterally, except -- I mean, if you have
18 an issue and you brought a motion to me and it was after the
19 deadline, I would certainly take that into consideration into
20 whether or not the relief should be granted.

21 MR. GASTEL: Your Honor, I think that we can all sort
22 of jointly agree to file a joint motion to the extent that you
23 want one.

24 JUDGE BOAL: Right now the order was that all the
25 case-specific fact and expert discovery shall be completed by

1 May 6th.

2 JUDGE ZOBEL: Do they have leave to file a motion?

3 JUDGE BOAL: Yes, they can file a motion.

4 MR. GASTEL: We will do so probably tomorrow, your
5 Honor. Thank you.

6 MS. JOHNSON: I believe that brings us to No. 10, the
7 status for future status conferences and discovery hearings --
8 I'm sorry -- the schedule for future status conferences and
9 discovery hearings.

10 The Court has already set both the discovery hearing
11 and the status conference for June 23rd. We had talked about
12 forgoing a July status conference. We weren't sure there was
13 much to do there. It does seem appropriate, though, to set a
14 July pretrial conference, now that the trial date for the
15 first Bellwether is moved to August. The parties had been
16 discussing July 28th.

17 JUDGE ZOBEL: Is that okay for us?

18 COURTROOM DEPUTY CLERK URSO: Yes, Judge. That would
19 be the 28th, at 2:00 for us.

20 JUDGE BOAL: Yes.

21 COURTROOM DEPUTY CLERK URSO: So, July 28th, at 2:00.

22 JUDGE ZOBEL: That will be a pretrial conference with
23 respect to the August 22 trial.

24 MS. JOHNSON: Yes, your Honor. And I suppose --

25 JUDGE ZOBEL: Do we anticipate to have the same

1 number of counsel participating in that as participate in the
2 regular status conferences?

3 MS. JOHNSON: I would not expect so. I would expect
4 it to be a smaller group, your Honor.

5 JUDGE ZOBEL: Let me explain to you what I would like
6 to do at the pretrial conference. You know, we send out these
7 notices and the prior lots of filing of paper, but the essence
8 of it is to decide how many jurors we have, how long the case
9 will take to try, how many peremptories each side will get,
10 and the most important, I want to decide precisely what the
11 issues are that we're going to try, and that will govern the
12 charge to the jury in the end as well as being very important
13 in making evidentiary rulings also.

14 I would like to review with you who the witnesses
15 will be. I hope that you will be able to agree on the
16 exhibits, for the most part, and then the only other thing I
17 would request of you -- well, with respect to witnesses, if
18 there is anybody who appears by deposition, I will discuss
19 with you what -- how we want to proceed with that, and I would
20 like then to have your requests for instruction and the
21 questions to the jury on special verdict maybe by the -- no.
22 By around the time that the trial begins. Don't need it much
23 earlier than that.

24 So that, in sum, is what I would like to discuss with
25 you at the pretrial conference, and then make some decisions

1 about some of these pretrial issues that can come up.

2 MS. GREER: And, your Honor, as to the jury
3 instructions, would you prefer that -- I mean, obviously,
4 we'll be efilng or submitting them to you -- well, actually,
5 how would you prefer that they be submitted?

6 JUDGE ZOBEL: Just file them the way you normally
7 file things.

8 MS. GREER: Okay. You don't need a Word version or
9 Word Perfect or --

10 JUDGE ZOBEL: No.

11 MS. GREER: Okay. Thank you.

12 JUDGE ZOBEL: But, anyway, that's for working out at
13 the pretrial conference in July. I just wanted to give you a
14 heads-up.

15 JUDGE BOAL: If I might just add, since I'm not
16 available anymore on June 23rd, I still remain available to
17 the parties in June if there is a discovery dispute that you
18 all feel needs to be resolved, and if there's a motion that
19 comes in on discovery, if you all would -- and you are welcome
20 to call Mr. York and get an oral argument date. I can take it
21 by phone or in person some other day, but I don't want to hold
22 up the rest of the case just because I'm not available on June
23 23rd. I mean, I don't know if everyone else has schedules on
24 June 23rd.

25 JUDGE ZOBEL: Is that the only day you can?

1 JUDGE BOAL: I'm not available that Thursday through
2 Friday morning.

3 JUDGE ZOBEL: Do you want to move the date back to
4 Wednesday, for example, or is that --

5 MS. JOHNSON: That would work for the Plaintiffs'
6 Steering Committee, your Honor.

7 JUDGE ZOBEL: I'm sorry?

8 MS. JOHNSON: That would work for the Plaintiffs'
9 Steering Committee.

10 JUDGE ZOBEL: Would it work for other counsel?

11 MR. KIRBY: It would not work for Box Hill. It
12 wouldn't work for Box Hill Surgery Center.

13 MR. GIDEON: We will make it work. June 21?

14 JUDGE BOAL: 22nd.

15 COURTROOM DEPUTY CLERK URSO: No. June 22nd.

16 MR. GIDEON: We'll make that work.

17 JUDGE ZOBEL: So, is everybody, except Box Hill,
18 agreeable to June 22?

19 MR. KIRBY: We'll make it work, too, your Honor.

20 JUDGE ZOBEL: Okay. Thank you.

21 COURTROOM DEPUTY CLERK URSO: I'm sorry, Judge. Ours
22 is also on June 22nd?

23 JUDGE ZOBEL: Yes.

24 COURTROOM DEPUTY CLERK URSO: So, June 22nd, at 2:00
25 for us. We just have one status conference. So, I'll move it.

1 JUDGE ZOBEL: So, June 22, at 2:00?

2 COURTROOM DEPUTY CLERK URSO: Yes, at 2:00.

3 JUDGE ZOBEL: And are you planning to having morning
4 hearings then or post --

5 JUDGE BOAL: Yes. I'll make it work as well. I know
6 you all prefer 11:30, if I can do that.

7 MR. GIDEON: That's fine.

8 JUDGE BOAL: And then in terms of July, I suppose --
9 perhaps this is more directed at Box Hill and Premier. Do you
10 think that we should schedule a tentative discovery conference
11 for that?

12 MR. WOLK: Judge, my suggestion would be maybe when
13 we're here in June, we can set a date in July, because I --
14 right now I can't anticipate that there would be any problems
15 that would have to be addressed in July. So, that's probably
16 better addressed in June.

17 MR. KIRBY: Agreed.

18 JUDGE BOAL: All right.

19 JUDGE ZOBEL: Okay. Now we come to Part D.

20 MS. JOHNSON: Just before we do that, your Honor, I
21 realized that the clinic -- the cases against the remaining
22 clinics that we were discussing earlier, technically those
23 have been stayed through June 1st. I think, given where we
24 are with the scheduling the other status conferences, the ones
25 going forward this summer, I would ask that that deadline be

1 extended until September 1. That will just carry us through
2 to the July and potentially August time period.

3 JUDGE ZOBEL: Is there any objection?

4 MR. GIDEON: No.

5 JUDGE ZOBEL: So that will happen, the stay goes on
6 until September 1.

7 MS. JOHNSON: Thank you, your Honor.

8 That then brings us to fully-briefed motions, the
9 series of discovery-related motions. The Dr. Kessler issue,
10 No. 11, I believe was addressed this morning. Also the
11 issues -- same issue raised in No. 12 and 13.

12 On the dispositive motions, counsel for both the
13 plaintiffs and the defendants in the Barakat, Ocean State
14 case -- the motion for summary judgment is addressed here --
15 have agreed to hold off on asking the Court for oral argument
16 on that motion, partly, if not entirely, in light of the
17 plaintiffs' questions about whether those cases may be
18 appropriately remanded.

19 JUDGE ZOBEL: Well, that answers my question as to
20 whether we should deal with a specific case dispositive
21 motions now or just wait.

22 MS. JOHNSON: And in at least this particular
23 instance, because I've spoken with counsel, they would prefer
24 that the Court wait.

25 JUDGE ZOBEL: We wait. And, in general, if there are

1 other such cases, you will advise.

2 MS. JOHNSON: Yes, your Honor. I believe that's the
3 only currently completely -- completed briefing that would
4 affect any of those cases.

5 That brings us to briefing in progress. I believe
6 Saint Thomas made a motion to some of the motions to dismiss
7 that were filed recently. Those are not completely briefed,
8 but they will be ready for the next status conference.

9 JUDGE ZOBEL: Now, other motions. Is there any
10 objection to No. 16, the Plaintiff Jones' motion for
11 substitution of party? I assume that it's an administrator or
12 executor or something of the sort?

13 MS. JOHNSON: I believe that's true, your Honor. I
14 didn't actually pull it before this conference. I'm not
15 certain, though, whether the time to respond to that has
16 formally run. I suggest that it has not because, otherwise,
17 we would have automatically promoted it to fully-briefed
18 motions.

19 JUDGE ZOBEL: Who are the defendants in this case?
20 You don't know?

21 MS. JOHNSON: I don't know. I apologize, your Honor.

22 JUDGE ZOBEL: All right. Well, if there is no
23 objection, let me know that and we'll just allow it without
24 opposition.

25 MS. JOHNSON: Certainly. We will do that.

1 JUDGE ZOBEL: Okay.

2 MS. JOHNSON: And I think that's it.

3 JUDGE ZOBEL: And then there are some dispositive
4 motions listed here.

5 MS. JOHNSON: There are, your Honor. Both the PSC
6 and the STOPNC defendants have filed dispositive motions.
7 None of those are fully briefed at this point.

8 JUDGE ZOBEL: So, the motions for leave to file
9 partial summary judgment on -- concerning governmental
10 entities, is that contested?

11 MR. GASTEL: It is -- well, I don't think that the
12 motion for leave is contested, your Honor.

13 JUDGE ZOBEL: Well, the motion for leave is allowed.
14 And you anticipate opposition?

15 MR. GASTEL: I anticipate an opposition, yes, your
16 Honor.

17 JUDGE ZOBEL: Okay. So, the motion for leave is
18 allowed, and we'll wait for the merits until later.

19 MR. GIDEON: Yes.

20 MS. JOHNSON: I believe 18, 19 and 20 -- I'm sorry --
21 18 and -- 18 also is a motion for leave to file.

22 MR. GIDEON: Your Honor, we submitted a four- or
23 five-page motion for leave to submit motion for summary
24 judgment on specific subject categories that are reflected in
25 Document No. 2867, consistent with the Court's prior order.

1 JUDGE ZOBEL: Right.

2 MR. GASTEL: Your Honor, the PSC does not object to
3 the motion for leave for 2867.

4 JUDGE ZOBEL: Okay. So, it's allowed.

5 Now, what does that motion deal with?

6 MR. GIDEON: It deals with a number of legal issues.
7 For example, application of the Tennessee doctrine of
8 independent superseding cause. It deals with just a series of
9 specific points that we think we can brief relatively
10 efficiently.

11 JUDGE ZOBEL: How do these motions listed on Nos. 18,
12 19 and 20 differ from each other?

13 MR. GIDEON: Well, 19 and 20 are something we touched
14 on a few moments ago. No. 19 deals with the failure to
15 provide advanced written notice.

16 JUDGE ZOBEL: Okay.

17 MR. GIDEON: No. 20 is separate. It is the failure
18 to provide a certificate of good faith with the complaint.
19 And No. 18 is the omnibus identification of the topics upon
20 which we sought your permission to submit a motion for summary
21 judgment.

22 JUDGE ZOBEL: Okay. I think -- I will have to look
23 at all these motions. I mean, No. 18 appears to have
24 something like motion for leave to file eight different
25 summary judgment motions.

1 MR. GIDEON: Yes, I think the subject categories are
2 six or seven total.

3 JUDGE ZOBEL: Well, the motion itself had eight.

4 MR. GIDEON: Okay. Well --

5 JUDGE ZOBEL: I'm not sure all of them should go.
6 So, I will look at that. I will -- even though there is an
7 admission by plaintiffs that they don't object to the filing
8 of the motions, I guess you can file the motions, but I think
9 they won't all go forward.

10 MR. GIDEON: Well, we would hope they would all be
11 granted, which would thoroughly shorten the trial.

12 JUDGE ZOBEL: Okay. Well, I will give you a fast
13 decision, but we're not -- I don't believe that we will go
14 forward on all of these specific issues one through eight.

15 MR. GIDEON: May I have your permission, however, to
16 submit motions on each of those points so that you, at least,
17 know the reasoning we have submitted?

18 JUDGE ZOBEL: You may do that.

19 MR. GIDEON: Thank you.

20 MR. GASTEL: Your Honor, on 17 and 18, now that
21 you've allowed those motions, do you want to set a deadline
22 for when they're going to be filed?

23 JUDGE ZOBEL: You tell me.

24 MR. GASTEL: 17 we can file tomorrow, your Honor.

25 JUDGE ZOBEL: Tomorrow is the 20th. Okay. Is that

1 the only one?

2 MR. GASTEL: Well, 18 is not my motion, your Honor.
3 I think that Mr. Gideon would probably -- I would say
4 tomorrow, but Mr. Gideon might want some more time.

5 MR. GIDEON: Yes.

6 JUDGE ZOBEL: He's done them all. He's already filed
7 them.

8 MR. GIDEON: They're a work in progress, but they
9 have to be perfect before they're submitted to you.

10 JUDGE ZOBEL: How long will it take you to get
11 perfection?

12 MR. GIDEON: Ten days.

13 JUDGE ZOBEL: Ten days?

14 MR. GIDEON: Yes.

15 JUDGE ZOBEL: These pertain to the trial, don't they?

16 MR. GIDEON: Well, the trial is in August, and I know
17 that the Court will be very prompt in looking at these
18 carefully and ruling on them. May I have ten days?

19 JUDGE ZOBEL: That would take us to the 29th?

20 MR. GIDEON: Takes us to the 29th of May.

21 JUDGE ZOBEL: That would be a Sunday. How about the
22 27th so that you won't have to work over the weekend.

23 MR. GIDEON: That's fine. Thank you.

24 MS. GREER: Your Honor, the Saint Thomas Entities
25 have also joined in that motion and we filed that yesterday.

1 So, it was after the status conference. That document number
2 is 2880.

3 And I also wanted to advise the Court -- I touched on
4 this earlier -- that we have filed a motion for leave to file
5 a motion for partial summary judgment on the apparent agency
6 claims of the Bellwether plaintiffs. That's 2878, also filed
7 yesterday. And, finally, we have filed a --

8 JUDGE ZOBEL: Isn't that already dealt with?

9 MS. GREER: On apparent agency, not actual.

10 JUDGE ZOBEL: Oh.

11 MS. GREER: It's limited to -- as you recall, we said
12 we would only move for apparent agency once we had deposed the
13 individuals. So, that pertains simply to the Bellwether
14 plaintiffs.

15 JUDGE ZOBEL: Okay. So, when are you going to file
16 that?

17 MS. GREER: Could we also have until the 27th?

18 MR. GASTEL: Your Honor, just to be clear, we are not
19 conceding to the motions that were filed yesterday. We are
20 continuing to review those, and I am certain that we are going
21 to object to the Saint Thomas Entities also getting to brief
22 the issues that are raised in 2867.

23 MS. JOHNSON: Put differently, your Honor, there are
24 already eight motions for summary judgment coming from STOPNC.

25 JUDGE ZOBEL: I know.

1 MS. JOHNSON: Now we have additional Saint Thomas
2 Entities that appear, at least at first glance, to be raising
3 many of the same issues. From the PSC's perspective where we
4 have to respond quickly to these, given the trial date, it
5 does seem a bit much.

6 MS. GREER: Again, your Honor, we've joined in the
7 STOPNC motion as to those particular issues.

8 JUDGE ZOBEL: Why don't you file a joint motion? You
9 have the same issues.

10 MS. GREER: And we probably will. We're not going to
11 -- we're not going to --

12 JUDGE ZOBEL: Well, not "probably." Why don't you do
13 that? By the 27th you file whatever you want that you seek
14 leave to file under 2867.

15 MS. GREER: Okay. I was -- for the 27th, I was --
16 pertaining to the apparent agency motion. That's not specific
17 to us. STOPNC does not have that same motion. That's a
18 completely -- that deals with the relationship between the
19 Saint Thomas Entities and STOPNC and the vicarious liability.

20 MR. GASTEL: And we're not conceding to the motion
21 for leave at this time, your Honor. We're continuing to
22 review that. It was just filed yesterday when I was --

23 JUDGE ZOBEL: The motion for leave to file is on and
24 they have time to respond and then I'll deal with it.

25 MR. GASTEL: And, you know, our response that to is

1 due, I believe, next Wednesday.

2 JUDGE ZOBEL: That's fine.

3 MS. GREER: And, likewise, your Honor, we have a
4 similar motion to STOPNC's on the dismissal under the
5 Tennessee Healthcare Liability Act for the 60-day notice
6 violations --

7 JUDGE ZOBEL: That's the one that you argued at the
8 beginning of this hearing, isn't it?

9 MS. GREER: Well, then you deferred ruling on those
10 particular issues until this point. We're in the same --
11 we're in the same situation as STOPNC, although the issues are
12 a little bit different because like on some of ours do not
13 match exactly theirs, but it's not a question of what the
14 Court will have to decide. It's just a question of when the
15 Court decides whether or not the failure to give 60 days
16 notice is fatal. Then that is just a matter of applying it to
17 the cases. Our cases don't match up to theirs exactly just
18 because of the way that --

19 JUDGE ZOBEL: Well, until that happens, there's
20 nothing to do, right? Until I rule on the -- the matter now
21 before me, you don't have to worry about application, do you?

22 MS. GREER: Well, we had the -- the 18th was the
23 deadline for motions for leave, and it's not clear whether it
24 has to be submitted in this Court as a motion to dismiss or a
25 motion for summary judgment. So, we filed a motion for leave

1 to address those issues.

2 JUDGE ZOBEL: And those were just filed yesterday?

3 MS. GREER: Correct.

4 JUDGE ZOBEL: So, I haven't even seen them.

5 MS. GREER: Okay. I just wanted the Court to be
6 aware that we do have a similar motion pending on that.

7 JUDGE ZOBEL: Okay. Thank you.

8 MS. GREER: Thank you.

9 JUDGE ZOBEL: That is the end of the agenda.

10 Is there anything else that anybody wishes to raise?
11 Yes.

12 MR. GIDEON: One of the comments the Court made was
13 at the status conference you wanted to know who is going to
14 testify in person as compared to deposition.

15 JUDGE ZOBEL: That is for the pretrial conference.

16 MR. GIDEON: Yes. Yes. May I ask you to direct us
17 to identify who is going to testify by deposition well in
18 advance of that pretrial conference so we, at least, can have
19 objections to you before the pretrial conference or perhaps to
20 Judge Boal so there can be a ruling on that --

21 JUDGE ZOBEL: On what?

22 MR. GIDEON: On whether the objections to the
23 deposition testimony are well-taken. I've heard a lot of
24 comments about the trial coming up close --

25 JUDGE ZOBEL: No. What I meant to say -- are you

1 talking about whether you object to a witness appearing by
2 deposition rather than in person?

3 MR. GIDEON: No. What I'm more specifically
4 addressing is, if there is somebody who someone intends to
5 call by deposition, there's no real issue about whether they
6 can or cannot come by deposition. I would think the Court
7 would want to know the components of that deposition testimony
8 that are objected to in advance of the pretrial conference.

9 JUDGE ZOBEL: No.

10 MR. GIDEON: Okay.

11 JUDGE ZOBEL: I don't see any reason for that. The
12 way I would normally do it -- and to some extent, it depends
13 on how many of these people are not going to be here in
14 person. Heavens, I hope that doesn't happen. What I would
15 normally ask is counsel to designate on the transcript what
16 portions they're offering and whether there are objections,
17 and I will rule on the transcript --

18 MR. GIDEON: Okay.

19 JUDGE ZOBEL: -- whether the question is
20 objectionable or not.

21 MR. GIDEON: But you don't expect that at the
22 pretrial conference itself?

23 JUDGE ZOBEL: I do not.

24 MR. GIDEON: Okay.

25 JUDGE ZOBEL: We will -- you know, I prefaced my

1 remarks by saying that I don't believe in a whole lot of
2 giving you orders on how to do it and then get 100-page
3 pretrial memorandum. That doesn't make sense to me. I want
4 to talk with you. I want to deal with -- I want to work out
5 with you how we're going to conduct the trial in the way that
6 makes the most sense for everybody and that, hopefully,
7 reduces the cost to everybody.

8 MR. GIDEON: Okay.

9 JUDGE ZOBEL: I want to be practical about this. So,
10 I don't want huge amounts of paper, but it will be complicated
11 to -- if lots of people testify by deposition, we will need to
12 have a mechanism for how we deal with objections to particular
13 designations, and that's all I meant.

14 MR. GIDEON: Thank you.

15 JUDGE ZOBEL: Anybody else?

16 (No response.)

17 JUDGE ZOBEL: All right. I thank you, as always, and
18 look forward to seeing you in June.

19 MS. JOHNSON: Thank you, your Honor.

20 MR. TARDIO: Thank you, your Honor.

21 MR. GIDEON: Thank you, your Honor.

22 (Adjourned, 3:11 p.m.)

23
24
25 C E R T I F I C A T E

1 I, Catherine A. Handel, Official Court Reporter of the
2 United States District Court, do hereby certify that the
3 foregoing transcript, from Page 1 to Page 57, constitutes to the
4 best of my skill and ability a true and accurate transcription of
5 my stenotype notes taken in the matter of Multidistrict
6 Litigation No. 13-02419-RWZ, In Re: New England Compounding
7 Pharmacy Cases Litigation.

8
9
10 July 10, 2016
Date

/s/Catherine A. Handel
Catherine A. Handel, RPR-CM, CRR